

Assembly Bill No. 2585

Passed the Assembly August 30, 1996

Chief Clerk of the Assembly

Passed the Senate August 15, 1996

Secretary of the Senate

This bill was received by the Governor this ____ day
of _____, 1996, at ____ o'clock __M.

Private Secretary of the Governor

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CHAPTER ____

An act to repeal and add Section 2856 of the Civil Code, relating to sureties.

LEGISLATIVE COUNSEL'S DIGEST

AB 2585, Kuykendall. Guarantors.

Existing law provides that any guarantor, including a guarantor of an obligation secured by real property or any interest therein, may waive the guarantor's rights of subrogation and reimbursement and any other rights and defenses available to the guarantor by reason of specified provisions of existing law.

Existing law provides that specified waivers shall not apply to a guaranty of a loan to an individual primarily for personal, family, or household purposes, secured by a deed of trust or mortgage or a specified dwelling occupied by the borrower.

This bill would revise and recast these provisions to provide that a guarantor or other surety, including a guarantor of a note or other obligation secured by real property or an estate for years, may waive any or all of specified rights and defenses, as specified. It would also provide that specified waivers shall not apply to a guaranty or other type of suretyship obligation made in respect of a loan secured by deed of trust or mortgage on a specified dwelling if the loan was used to pay all or part of the purchase price of the dwelling. The bill also would state legislative intent in this regard.

The people of the State of California do enact as follows:

SECTION 1. Section 2856 of the Civil Code is repealed.

SEC. 2. Section 2856 is added to the Civil Code, to read:

2856. (a) Any guarantor or other surety, including a guarantor of a note or other obligation secured by real



property or an estate for years, may waive any or all of the following:

(1) The guarantor or other surety's rights of subrogation, reimbursement, indemnification, and contribution and any other rights and defenses that are or may become available to the guarantor or other surety by reason of Sections 2787 to 2855, inclusive.

(2) Any rights or defenses the guarantor or other surety may have in respect of his or her obligations as a guarantor or other surety by reason of any election of remedies by the creditor.

(3) Any rights or defenses the guarantor or other surety may have because the principal's note or other obligation is secured by real property or an estate for years. These rights or defenses include, but are not limited to, any rights or defenses that are based upon, directly or indirectly, the application of Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure to the principal's note or other obligation.

(b) A contractual provision that expresses an intent to waive any or all of the rights and defenses described in subdivision (a) shall be effective to waive these rights and defenses without regard to the inclusion of any particular language or phrases in the contract to waive any rights and defenses or any references to statutory provisions or judicial decisions.

(c) Without limiting any rights of the creditor or any guarantor or other surety to use any other language to express an intent to waive any or all of the rights and defenses described in paragraphs (2) and (3) of subdivision (a), the following provisions in a contract shall effectively waive all rights and defenses described in paragraphs (2) and (3) of subdivision (a):

The guarantor waives all rights and defenses that the guarantor may have because the debtor's debt is secured by real property. This means, among other things:



(1) The creditor may collect from the guarantor without first foreclosing on any real or personal property collateral pledged by the debtor.

(2) If the creditor forecloses on any real property collateral pledged by the debtor:

(A) The amount of the debt may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price.

(B) The creditor may collect from the guarantor even if the creditor, by foreclosing on the real property collateral, has destroyed any right the guarantor may have to collect from the debtor.

This is an unconditional and irrevocable waiver of any rights and defenses the guarantor may have because the debtor's debt is secured by real property. These rights and defenses include, but are not limited to, any rights or defenses based upon Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure.

(d) Without limiting any rights of the creditor or any guarantor or other surety to use any other language to express an intent to waive all rights and defenses of the surety by reason of any election of remedies by the creditor, the following provision shall be effective to waive all rights and defenses the guarantor or other surety may have in respect of his or her obligations as a surety by reason of an election of remedies by the creditor:

The guarantor waives all rights and defenses arising out of an election of remedies by the creditor, even though that election of remedies, such as a nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed the guarantor's rights of subrogation and reimbursement against the principal by the operation of Section 580d of the Code of Civil Procedure or otherwise.



(e) Subdivisions (b), (c), and (d) shall not apply to a guaranty or other type of suretyship obligation made in respect of a loan secured by a deed of trust or mortgage on a dwelling for not more than four families when the dwelling is occupied, entirely or in part, by the borrower and that loan was in fact used to pay all or part of the purchase price of that dwelling.

(f) The validity of a waiver executed before January 1, 1997, shall be determined by the application of the law that existed on the date that the waiver was executed.

SEC. 3. It is the intent of the Legislature that the types of waivers described in Section 2856 of the Civil Code do not violate the public policy of this state. Additionally, the Legislature, by enacting subdivisions (b), (c), and (d) of Section 2856 of the Civil Code, does not intend to address the legal requirements for waivers in a guaranty or other suretyship contract in connection with the types of transactions described in subdivision (e) of Section 2856 of the Civil Code. No inference of any kind should be drawn from the exclusion of these transactions from the application of subdivisions (b), (c), and (d) of Section 2856 of the Civil Code. These amendments are not intended to limit or otherwise affect any rights or protections currently afforded to borrowers under Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure.

Approved _____, 1996

Governor

